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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-683

STATE OF MISSOURI,
Petitioner,

vs.

ALL STAR NEWS AGENCY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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OPINIONS BELOW

The opinion of the Supreme Court of Missouri en banc reversing the judgment below, as yet unreported, is styled and numbered as, *State of Missouri* v. *All Star News Agency, Inc.*, ____ S.W.2d ____ (Mo.banc No. 61317, delivered October 10, 1979). The opinion is reproduced as Appendix A of Petitioner's Petition for Writ of Certiorari.

In a related case, on April 10, 1979, an opinion was filed by the Supreme Court of Missouri in *State of Missouri* v. *All Star News Agency, Inc.*, 580 S.W.2d 245 (Mo.banc 1979), which appeals involved civil proceedings between the same parties and

with similar facts. That case is also pending in this Court awaiting a ruling on the State's Petition for a Writ of Certiorari in case number 79-241.

The opinion is reproduced as Appendix B of Petitioner's Petition for Writ of Certiorari.

JURISDICTION

Respondent accepts Petitioner's jurisdictional statement.

QUESTION PRESENTED

Whether the total prohibition of All Star News Agency, Inc.'s, ability to continue to sell and distribute magazines and movies from the time of the service of a Notice of Adversary Hearing by the State constituted an illegal prior restraint of materials presumptively protected under the First Amendment in violation of the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

This petition deals with a proceeding wherein the State of Missouri sought the forfeiture and destruction of approximately two thousand films and twenty-six thousand magazines from the premises of All Star News Agency of St. Louis, Inc. (hereinafter referred to as All Star), located at 3721 Washington Avenue, St. Louis, Missouri.

Briefly, the materials were seized pursuant to a search warrant. Prior to the issuance of the warrant, a Notice of Adversary Hearing was served on All Star and an adversary hearing was conducted. Thereafter, the warrant was executed, seizures made, a motion to quash the warrant was heard and overruled, and the case was tried. Most of the items were shown to an advisory jury which declared almost all to be obscene by less than unanimous verdicts. The Court then made an independent

determination and agreed with the jury's findings on all but a few items. The Court then issued a Declaration of Forfeiture and Order for Destruction which was stayed pending appeal by All Star.

The relevant facts are as follows: on June 6, 1977, the State of Missouri requested the Circuit Court to issue a Notice of Adversary Hearing pursuant to the provisions of §542.281, R.S.Mo. 1975. The notice listed 147 items by name or otherwise. Item 148 was a general category which stated, "And all other items contained in and on the premises commonly known as 3721 Washington, St. Louis, Missouri, which are of a type, nature and description, similar to the aforesaid items Number 1 through 147". The notice also stated that intentional alteration, destruction or removal of any matter, or duplicate of matter, described in the notice, shall be subject to contempt of court proceedings. After serving the notice, police officers were stationed in the immediate area outside the premises to insure that no materials were taken from the warehouse (Tr.233-234). The police remained there 24 hours a day until the search warrant was executed (Tr.234).

The adversary hearing began on June 8, 1977 (Tr.1). Prior to the taking of testimony, counsel for All Star filed a Memorandum in Opposition to Issuance of Search Warrant (Tr.5-7), which was argued and overruled (Tr.9). The State did agree to amend the notice in regards to Item 148 (Tr.9). The notice was amended twice, each time over All Star's objection (Tr.19, 33-41, 105). Testimony commenced on June 8, and various police officers testified and filed written affidavits in support of their testimony (Tr.44-192).

After the completion of all testimony, counsel made oral agruments to the Court (Tr.212). Prior to issuing its ruling, the Court examined all items, numbered 1-147, in the Application for Search Warrant. Counsel for All Star argued that if a search

warrant issued it should be limited to the specific items viewed by the Court. On June 16, 1977, the Court entered its Memorandum Opinion ordering the search warrant issued for the 147 items specifically listed, and including the catch-all provision heretofore mentioned (Tr.212-221).

Executon of the search warrant commenced on June 16, 1977 (Tr.221). Out of the 147 items listed in the search warrant (magazines, movies and rubber items), 86 were found in the warehouse (Tr.245). In all, over 2,000 movies and 26,000 magazines were seized pursuant to the search warrant. Except for the 86 items viewed by the Judge (and any duplicates thereof), the remaining items and their duplicates which were ultimately seized were not viewed during this adversary hearing, and they were not viewed by anyone until the jury saw them some weeks later.

On July 5, 1977, testimony was taken on the Motion to Quash the search warrant (Tr.232) and the hearing on the motion disclosed the following facts: upon entering the All Star premises on June 16, and after reading of the search warrant was waived, Detective Sergeant Vincent Stehlin began to examine the contents of each book and magazine (Tr.240). Sgt. Stehlin stated that he made all determinations of what was to be seized; that he went through every magazine in the warehouse and designated what was to be seized and what was not to be seized (Tr.242, 249, 250-254). In reaching his determination, he would view the contents; if it appeared to be, or was an item seized where he had previously made arrests in bookstores and had convictions, if it either was the name of a book mentioned in the search warrant or a similar book, or if it was all pictures of sexual intercourse, sodomy, or unnatural acts, he seized the book (Tr.252). If he felt the materials fell within the contents of the search warrant, he seized it; if he did not, he told officers not to seize it (Tr.253). It would usually only take him a few seconds to look at a magazine and reach his decision on whether or not to seize it (Tr.262).

Det. Roy Joachimstaler was in charge of the movie room (Tr.247, 260). Although all of the movies found on the premises were seized, none were viewed prior to their seizure (Tr.260, 261). Some of the movies had a catalog taped to the front, some had pictures on the boxes, and some had nothing other than a title (Tr.260-262).

On July 8, 1977, after the jury was selected, the motion to quash was further discussed in chambers (Tr.292). Counsel for All Star pointed out that a comparison of the State's Exhibit List to the return of the search warrant indicated that 208 films were of a different brand than those examined by the Court during the Adversary Hearing (Tr.295-296). The Court never actually ruled on the motion to quash, but stated it would take the matter under advisement (Tr.296) and the trial began.

Presentation of the evidence commenced on July 8, 1977. All Star preserved its objections to the introduction of the evidence at trial (Tr.311, 314, 371, 352). It was during this three-week jury trial that for the first time the more than 26,000 magazines and 2,000 films seized by virtue of the general category were viewed.

On August 2, 1977, the jury concluded its deliberations and returned its verdicts, declaring most of the items to be obscene by less than unanimous verdicts. These verdicts, some seven and a half weeks after the items were seized, constituted the first determination as to the nature of the item seized pursuant to the general categories in the warrant. The trial judge entered his opinion and order on September 23, 1977 (Tr.372-350).

After hearings were concluded on post-trial motions, notices of appeal were duly filed to the Missouri Court of Appeals, St. Louis District, where an opinion was filed on January 23, 1979. On May 17, 1979, the cause was transferred to the Supreme Court of the State of Missouri, and was argued and submitted to that Court on September 17, 1979. The Supreme Court of

Missouri, en banc, reversed and remanded in an opinion rendered on October 10, 1979, holding that the procedures followed by the State constituted an illegal prior restraint of materials presumptively protected by the First Amendment of the Constitution of the United States. Thereafter, the State's motion for rehearing was denied, and the State filed its Petition for Writ of Certiorari to the Supreme Court of Missouri with this Court.

ARGUMENT

On June 6, 1977, a Notice of Adversary Hearing was served upon the "owner-manager-employees of All Star News Agency". This notice contained 147 specifically delineated titles concerning magazine publications, movies and rubber products. At the time of the service the notice also contained an item 148 which was in the nature of a "catch-all" phrase which read, "and all other items contained in and on the premises commonly known as 3721 Washington, St. Louis, Missouri, which are of a type, nature and description similar to the aforesaid items, number 1 through 147". This notice goes on to recite the language of §542.281, Paragraph 5, R.S.Mo., as follows:

> "After receipt of this notice of the hearing intentional alteration, destruction or removal of any matter, or duplicate of matter described in this notice shall be sought to 'contempt of court' proceedings."

As a result of this notice, All Star was effectively out of business until its stock was seized during the execution of the search warrant.

The State conceeds that under the facts in this case, the opinion of the Supreme Court of Missouri in *State* v. *All Star News, Inc.*, 580 S.W.2d 245 (Mo banc 1979), is controlling. Consequently, this Court's action in granting or denying certiorari in case number 79-241 will have direct application to the instant proceedings.

In its Petition, the State has alleged that (l.c.7):

> "The crux of the Missouri Supreme Court's holding in this and in previous *All Star* cases is that the provision in §542.281.5, R.S.Mo. 1975 Supp., which prohibits the alteration, destruction or removal of materials described in the application for search warrant during the maximum

ten-day period between the application constitutes an impermissible prior restraint which violates the distributor's First Amendment rights."

Though the Respondent has consistently urged this holding both in this and in prior *All Star* cases, a plain reading of the opinion of the Supreme Court of Missouri will show that it has not, as of yet, reached this issue.

Respondent would contend that §542.281 to 542.301, inclusive R.S.Mo., are unconstitutional as they result in the imposition of an absolute prior restraint on materials which are presumptively protected, and afforded the protections under the First and Fourteenth Amendments of the Constitution of the United States and Article I, Section 8 of the Constitution of the State of Missouri. In *Roaden* v. *Kentucky,* 413 U.S. 496, 504 (1973), this Court stated, ". . . prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness."

In the instant cases, specifically enumerated items were examined by the issuing judge, but the notice contained a general category, and this general category related back in language that is incapable of precise meaning. Not only did All Star face the potential threat of contempt of court for selling a magazine or movie that was not specifically named in the notice, as provided by Statute, supra, but its right to so traffic in these materials was totally restricted by the presence of police officers at the entrances and exits to the premises occupied by All Star. Furthermore, and perhaps most importantly, the great majority of the items finally seized were in the general category and were not examined by either a judge or a jury for several weeks after the initial seizure. During all this time, All Star was unable to sell the materials and the public was deprived of its right to obtain them. The Missouri Supreme Court realized that the approach the State took in this case was more effective than any injunction that could have been obtained. The procedure which was

devised by the State was designed to side-step the procedural safeguards guaranteed to the respondent by the Constitution of the United States, as noted. The specificity requirement as set forth in *Miller* v. *California,* 413 U.S. 15 (1973), is definitive of the inadequacy of the general "catch-all" provisions and their ultimate affect as contained in the notices in the case at bar.

In the landmark case of *Marcus* v. *Search Warrants,* 367 U.S. 717 (1961), this Court discussed the impropriety of a prior statutory procedure in Missouri which permitted a prior restraint of presumptively protected materials. The Court stated (l.c.736-738):

> "But there is no doubt that an effective restraint—indeed the most effective restraint possible—was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor. An opportunity comparable to that which the distributor in Kingsley Books might have had to circulate the publication despite the interim restraint and then raise the claim of non-obscenity by way of defense to a prosecution for doing so was never afforded these appellants because the copies they possessed were taken away. Their ability to circulate their publications was left to the chance of securing other copies, themselves subject to mass seizure under other such warrants. The public's opportunity to obtain the publications was thus determined by the distributor's readiness and ability to outwit the police by obtaining and selling other copies before they in turn could be seized. In addition to its unseemliness, we do not believe that this kind of enforced competition affords a reasonable likelihood that nonobscene publications, entitled to constitutional protection, will reach the public. A distributor may have every reason to believe that a publication is con-

stitutionally protected and will be so held after judicial hearing, but his belief is unavailing as against the contrary judgment of the police officer who seizes it from him. Finally, a subdivision of the New York statute in Kingsley Books required that a judicial decision on the merits of obscenity be made within two days of trial, which in turn was required to be within one day of the joinder of issue on the request for an injunction. In contrast, the Missouri statutory scheme drawn in question here has no limitation on the time within which decision must be made, only a provision for rapid trial of the issue of obscenity. *And in fact over two months elapsed between seizure and decision.* In these circumstances the restraint on the circalculation (sic) of publications was far more thoroughgoing and drastic than any restraint upheld by this Court in Kingsley Books." (Emphasis added)

The concept of the seizure itself is contrary to *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49 (1973), in that before the final hearing all merchandise and items in question may be seized or effectively restrained from sale. The general inclusions of the "catch-all" category without any specificity to it creates a situation whereby there is not a determination of those matters until the ultimate jury trial. A period of time necessarily had to pass where the recipient of the notice is subject to the penalties of contempt based upon vague and imprecise descriptions of a category of material that he might sell at its own risk. However, in these cases the Petitioner removed even this possibility of continued circulation of books and films by placing police officers at all entrances and exits of the respondent's warehouse; nothing was brought in or out throughout the execution of the warrant. The notices were served on June 6, 1977, but the jury's verdict was not rendered until August 2, 1977, and the Court's decision entered on September 23, 1972. (Tr. 350 et seq.). Hence, contrary to Petitioner's assertions, there was in fact ap-

proximately four (4) months of total suppression even though some items were later found not obscene and protected. While it is now clear that the government can regulate the sale of obscene material, it is equally manifest it can do so only, ". . . under the procedural safeguards designed to obviate the dangers of censorship system." *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 559 (1975). One of the primary safeguards is a "prompt final judicial determination" that the material to be censored is, in fact, obscene. See also *Freedman* v. *Maryland,* 380 U.S. 51 (1965). In the absence of a prompt, prior judicial determination any action which abates or censors the exhibition of films or magazines violates the constitutional principle against prior restraint of presumptively protected material. *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363, 367 (1971); *Freedman* v. *Maryland, supra,* at page 58; *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1957).

Put very directly and simply, the sale or distribution of any material can not be restrained in any form or manner and especially by threat of contempt without a court first making a specific determination that the particular item, be it a newspaper, magazine, film or any media, is obscene. Actual physical restraint compounds the constitutional invalidity of the procedure.

Near v. *Minnesota ex rel. Olson,* 283 U.S. 697 (1931), is directly on point. The statute in question in *Near* did not require approval of all publications before distribution. Rather, it allowed a court to enjoin the publication of a "malicious, scandalous and defamatory" newspaper (see page 702). The injunction was issued after Near had published nine (9) such newspapers. On appeal, the Supreme Court struck the statute down because it allowed a restraint of future publications based on the offensiveness of past publications. Similarly, here, the threat of contempt chilled the respondent's right to sell movies or magazines prior to any final determination of obscenity vel non.

The distinction between restraint based on judgment that specific material is obscene and prior restraint without such adjudication is clearly drawn in *Kingsley Books, Inc.* v. *Brown, supra* (l.c. 445):

> "It only remains to say that the difference between *Near* v. *Minnesota,* 283 U.S. 697, 75 L.Ed. 1351, 51 S.Ct. 625, supra, and this case is glaring in fact. The two cases are no less glaringly different when judged by the appropriate criteria of constitutional law. *Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive.* In the language of Mr. Chief Justice Hughes, *'This is of the essence of censorship.'* 283 U.S. 713. As such, it was found *unconstitutional.* This was enough to condemn the statute wholly apart from the fact that the proceeding in *Near* involved no obscenity but matters deemed to be derogatory to a public officer. Unlike *Near,* Section 22-a concerned solely with obscenity and, as authoritatively construed, it *studiously withholds restraint upon matters not already published and not yet found to be offensive."* (Emphasis added).

Beyond doubt, there is no "studious restraint upon matters not already published and not yet found to be offensive." Respondent is unable to impose any such constitutional restraint upon itself.

An examination of relevant decisions from other jurisdictions will show the blatant illegality of the procedure employed by the State. That these statutes may be employed by the Petitioner to "censor" and "restrain" future sales of books, magazines and films by threat of contempt of court and the use of police officers, and be allowed to so function for a period of some four (4) months before a final judicial determination is made was the compelling reason for the Missouri Supreme Court to find the

procedures employed to be in violation of the First, Fourth and Fourteenth Amendments of the Constitution of the United States.

The facts in the cases at bar should be compared with those as discussed in *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49 (1973), wherein those proceedings forbade the removal of films until the date of hearing but allowed their continued exhibition. The Court approved that scheme only because there was an allowed continued exhibiton of the materials or films until such time as there was a prompt and final judicial determination. The decision of this Court in *Kingsley Books, supra,* stands for the proposition that books or films may not be enjoined until there has been an individual determination of obscenity. Accord: *Organization For a Better Austin* v. *Keefe,* 402 U.S. 415 (1971). The result of Petitioner's actions was to reverse the concept of presumptive protection of First Amendment materials to censorship by the State pending judicial affirmation, an action which the Supreme Court of Missouri recognized as improper.

In support of its holding in the first All Star case, the Supreme Court of Missouri cites five "teachings" which are apparent in the decisions of this Court on the subject of obscenity. *State* v. *All Star News Agency, Inc., supra,* at 247. Petitioner specifically points to the third of these five teachings which Petitioner claims is a holding by the Supreme Court of Missouri that the First Amendment prohibits the restraint of more than one copy of a given item. (Petitioner's Petition page 11). In so claiming, the State has apparently misread the holding of the Missouri Supreme Court.

In that regard, the Missouri Supreme Court held ". . . that a prior restraint of one copy of each magazine or film alleged to be obscene may be permissible in order that a determination of the question probable obscenity may be made." *All Star,* supra, at 247. This Court, in discussing its prior decision in the case of *Heller* v. *New York,* 413 U.S. 483 (1973) has recently stated:

"We also cannot accept the State's contention that it acted in compliance with *Heller* v. *New York,* 413 U.S. 483 (1973). There, based on police reports of probable violation of state law, a judge viewed a film in a theatre as an ordinary paying parton; on the basis of his observation of the entire performance he then issued a warrant for the seizure of the particular viewed film as evidence. There was no claim that the seizure of the single copy impeded the exhibitor's continued business pending decision on the issue of obscenity. *Heller's claim was that not even one of his films could be seized without a prior adversary hearing.* We rejected that claim . . ." (emphasis added) *Lo-Ji Sales Incorporated* v. *New York,* ____ U.S. ____, 99 S.Ct. 2319 (1979).

Respondent would contend that *Heller* v. *New York, supra,* and *Lo-Ji Sales, Inc.* v. *New York, supra.,* constitutes ample authority for the Missouri Supreme Court to make the simple declaration that under the proper circumstances the prior restraint of one copy of a magazine or film alleged to be obscene may be permissible in order that a determination of the question of probable obscenity may be made.

While the Court states that the prior restraint of one copy is permissible, it does not necessarily follow that in all circumstances the restraint of more than one copy is impermissible. In any event, such a declaration is unnecessary to the Court's holding. The case at bar is precisely like the cases presented to this Court in *A Quantity of Books* v. *Kansas,* 378 U.S. 205 (1964) and *Marcus* v. *Search Warrant, supra.,* in that this case concerns the seizure of a mass quantity of books and films for the sole purpose of their destruction. This Court has held that in those circumstances, a prior judicial determination of obscenity in an adversary proceeding is required to avoid ". . . dangers of abridgement of the right of the public in a free society to unobstructed circulation of non-obscene books." *A*

Quantity of Books v. *Kansas, supra,* at 213. This holding was reaffirmed by this Court in *Heller* v. *New York, supra.,* at 491.

The extent of the Petitioner's attacks on the opinions below reveal its fundamental misunderstanding on those opinions. It appears to be the State's position that the Supreme Court of Missouri held that the provision of §542.281, R.S.Mo., for the ten day restraint of First Amendment materials pending the judicial determination of probable cause to search is, per se, an impermissible prior restraint. A plain reading of the opinion clearly demonstrates that there was no such holding.

The opinion below can be divided into five basic parts: a brief statement as to the nature of the proceding; a summary of the facts presented to the court; a citation to controlling law and brief statement of the general principles for which they stand; a conclusion that the facts presented to the Court constituted an impermissible prior restraint in violation of the First, Fourth and Fourteenth Amendments; and a determination that, "Since a violation of these Amendments infected the proceedings, in order to vindicate appellant's constitutional rights the judgments must be reversed, and the causes remanded for further proceedings not inconsistent with this opinion." *State* v. *All Star News, Inc., supra,* at 248.

Though Respondent has consistently urged, and still urges, that the provisions in §542.281, R.S.Mo., constitutes a *per se* unconstitutional prior restraint, the Supreme Court of Missouri has not so held. The Missouri Supreme Court's ruling is merely a determination that, under the facts of the instant case "(T)here were prior restraints of materials presumptively protected under the First Amendment." *All Star, supra,* at 247.

The State decries the alleged effect of this holding, making the point that absent the prohibition against the removal of the films and/or magazines the items might be destroyed or removed to another jurisdiction. This precise argument was made

by counsel for Kentucky in *Roaden* v. *Kentucky, supra,* and counsel for New York in *Heller* v. *New York, supra.,* and has been specifically rejected by this Court, *Roaden* v. *Kentucky, supra,* at 505 n.6, in which this Court stated that ". . . procuring a warrant based on a prior judicial determination of probable cause of obscenity need not risk loss of evidence."

In addition, Respondent would show the Court that the search warrant issued in the instant case was nearly indentical to the *Lo-Ji* warrant. The warrant contained an enumerated list of items but then included a general catch-all category which began with the vague and overbroad clause, "Other magazines, books, motion picture films, photographs, pictures or publication, which depict, describe or portray . . .,". The warrant listed 147 items. Yet the executing officers used this warrant to seize over 26,000 magazines and 2,000 films (Tr.245). By admission only 86 of the thousands of items seized were specifically listed in the warrant. (Tr.245). This was not a search for the materials specifically listed in the warrants. The executing officer used the general category of the warrant as a justification to replace the ruling of the trial court with his own discretion in interpreting the warrant. The officer who supervised the execution of the warrant testified that items were seized if he felt that they were obscene (Tr.253).

In *Lo-Ji,* this Court stated (l.c. 99 S.Ct.2324):

> ". . . the warrant left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure. The Fourth Amendment does not permit such action. Roaden v. Kentucky, 413 U.S. 496, 502, 93 S.Ct. 2796, 2800, 37 L. Ed. 2d 737 (1973); Stanford v. Texas, supra, 379 U.S. at 485, 85 S.Ct., at 511; Marcus v. Search Warrant, supra, 367 U.S., at 732, 81 S.Ct., at 1716."

Because it held that there was an illegal prior restraint the Missouri Supreme Court did not reach the merits of Respondent's contentions that the search and seizure herein was clearly improper. Should this Court grant Petitioner's Writ of Certiorari and remand the case to the Missouri Supreme Court, Respondent submits that *Lo-Ji Sales, Inc.* v. *New York, supra,* would be controlling.

CONCLUSION

For the foregoing reasons, we respectfully suggest that the Petition for Certiorari be denied.

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